IN THE

Supreme Court of the United States

October Term, 1961

No. 144

STATE BOARD OF INSURANCE, ET AL.,
Petitioners,

v.

TODD SHIPYARDS CORPORATION,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District, Sitting in Austin, Texas

BRIEF FOR THE CHURCH FIRE INSURANCE CORPORATION AND THE CATHOLIC RELIEF INSURANCE COMPANY OF AMERICA AS *AMICI CURIAE*

CLOYD LAPORTE,
JOHN MASON HARDING,
40 Wall Street,
New York 5, New York.
Attorneys for The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America as amici curiae.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
40 Wall Street,
New York 5, New York.
Of Counsel.

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The Interest of the *Amici Curiae*

The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America, with the consent of both parties, submit this brief as *amici curiae* in support of the respondent, Todd Shipyards Corporation.

The present case constitutes, so far as is known, the most extreme attempt by a state to regulate or tax insur-

ance transactions beyond its jurisdiction that has been presented for review by this Court in recent years. Texas here in effect claims that the presence within its borders of property insured elsewhere subjects all aspects of the insurance of that property to its regulatory and taxing jurisdiction. Prior decisions of this Court clearly render this claim invalid under the due process clause, as the courts below recognized. Texas concedes that its claim of jurisdiction is unfounded under those decisions, but asks the Court to reconsider those decisions and to overrule them.

For the Court to do so would violate settled and established constitutional principles, as will be shown below, and would have grave repercussions on the operation of the insurance industry under the present system of state regulation and taxation of insurance, with serious consequences for The Church Fire Insurance Corporation and for The Catholic Relief Insurance Company of America.

The Church Fire Insurance Corporation is a New York fire insurance corporation with its principal office in New York. It is subject to the New York Insurance Law, submits annual reports to the New York Insurance Department and is periodically examined by the New York Insurance Department as required by statute. Church Fire is a non-profit corporation, all of its stock being owned by The Church Pension Fund, the pension system for the clergy of the Protestant Episcopal Church. Since its incorporation in 1929, Church Fire has limited its business to that for which it was organized, namely, the insurance of churches and other property of the Protestant Episcopal Church and

affiliated organizations against fire and allied hazards.* Its insurance rates, together with a method of installment payment of premiums, result in savings on the insurance of church properties in excess of 27% over standard commercial rates. Church Fire has no agency system, but conducts its business principally by direct dealings, in person and by mail, between its representatives in New York and church officials of the individual dioceses and parishes desiring insurance.

The operation of The Catholic Relief Insurance Company of America parallels that of Church Fire, The Catholic Relief Insurance Company providing insurance for the properties of the Roman Catholic Church. The Catholic Relief Insurance Company is a Nebraska insurance corporation with its headquarters in Omaha. It is subject to the Nebraska Insurance Law, submits annual reports to the Nebraska Insurance Department and is periodically examined by the Nebraska Insurance Department. It is a non-profit corporation, all of its stock being owned by The Catholic Mutual Relief Society of America, a religious and benevolent society organized in 1889 and incorporated under the laws of Nebraska in 1896 for the purpose of providing relief for organizations of the Roman Catholic Church in the event of a disaster or calamity involving their properties. In accordance with its Articles of Incorporation, The Catholic Relief Insurance Com-

* Article IV of the Charter of Church Fire provides that

"... it is the intention that the Corporation shall confine itself to insurance on churches, rectories, schools, hospitals and all kinds of buildings, household furniture and other property of the Protestant Episcopal Church, its dioceses, parishes or other organizations of the said Church, or of any corporations or associations affiliated therewith, or any property owned, or held by any person, association or corporation and used to promote the interests of the Protestant Episcopal Church."

pany has confined its business to the insurance of properties owned by the Roman Catholic Church, principally to fire and casualty insurance (the Company is not permitted by its Articles of Incorporation to write life insurance).* It has no agency system, and, as in the case of Church Fire, provides insurance for church property at substantial savings over standard commercial rates.

The amount of insurance business done by Church Fire and The Catholic Relief Insurance Company is of necessity limited by the size of the Protestant Episcopal Church and the Roman Catholic Church and the amount of property owned by their component organizations.

In addition to being licensed in New York, Church Fire in 1960 was licensed as a foreign insurer in twenty-three states (including Texas) where the volume of business done and the scope of its activities have made qualification appropriate. In addition it issues policies covering church properties in each of the remaining twenty-six states in which it is not licensed. Its premium income from those twenty-six states in 1960 ranged from $35,666.33 from Missouri and $27,797.24 from Kentucky on down to $504.80 from Hawaii and $16.24 from Alaska.** The Catholic Relief Insur-

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* Article III of the Articles of Incorporation of The Catholic Relief Insurance Company provides that the Company's contracts of insurance shall be limited to "Members of the Catholic Mutual Relief Society of America and the properties or affairs or interests under their charge or administration." Only Ordinaries of Dioceses (the Archbishops and Bishops thereof) and Superiors of Religious Orders in the Hierarchy of the Roman Catholic Church may be members of The Catholic Mutual Relief Society of America.

**Annual Statement of Church Fire to the New York Insurance Department, 1960. Portions of the Annual Statements of Church Fire are set out in the published Annual Reports of the New York Superintendent of Insurance. Additional information concerning Church Fire and The Catholic Relief Insurance Company is contained in Best's Insurance Reports, Fire and Casualty, 1961, pp. 222, 241.

ance Company is licensed to do business only in Nebraska. Although it writes insurance covering church properties in 167 dioceses and religious orders in thirty-two states (including Nebraska), the volume of its business and the scope of its activities have not as yet been sufficient to warrant qualification as a foreign insurer in any state. Its premium income in 1961 from states other than Nebraska ranged from $27,946.58 from California to $24.01 from West Virginia.*

It is not unrealistic to expect that the states in which Church Fire and The Catholic Relief Insurance Company are not now licensed would be quick to exercise additional taxing and regulatory powers granted to them as the result of a decision in favor of Texas in this case. Church Fire and The Catholic Relief Insurance Company could not afford to continue issuing policies on church properties in these states on the basis of their present premium income if they are subjected to the jurisdiction of these states solely because of the presence in the states of the risks insured. The payment of additional taxes would be an initial burden, and compliance with regulatory requirements an even greater burden, involving the submission and approval of policy forms, filing of annual reports and ascertaining and complying with the states' substantive requirements.

Because of the limited number of church properties in these states and the consequent limits on any increase in the volume of insurance, the practical effect of subjecting Church Fire and The Catholic Relief Insurance Company to the jurisdiction of these states would be to prevent Church Fire and The Catholic Relief Insurance Company for the foreseeable future from writing

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* Annual Statement of The Catholic Relief Insurance Company to the Nebraska Insurance Department, 1961.

insurance on church properties located there, to the cost of the dioceses, parishes and religious orders in those states.

Church Fire and The Catholic Relief Insurance Company therefore submit this brief to ask the Court not to overturn the established constitutional principles which prohibit a state from taxing or regulating out-of-state insurance transactions solely on the basis of the physical presence of the insured property in the state.

Summary of Argument

The due process clause prohibits Texas from taxing or regulating insurance transactions outside Texas.

The due process clause plays an essential role in the system of state regulation and taxation of insurance. It has in effect served as the arbiter of the system, protecting individual insurance transactions against overreaching by individual states and militating against conflicting regulation and multiple taxation, both before and after the decision of this Court in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944), when this Court for the first time held that insurance was "commerce." Indeed, when Congress after that decision expressed its desire by the McCarran Act that the regulation and taxation of insurance continue to be left to the states without impediment from the commerce clause, Congress indicated its reliance on the due process clause as the means by which the states would continue to be confined within the bounds of their proper legislative concern over local interests, referring specifically to this Court's decisions in *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346 (1922), and *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77 (1938). To overrule these cases, as Texas

asks here, would be vastly to expand the authority of every state with which an insurance transaction has any connection, thereby substantially increasing the risks of conflicting regulation and multiple taxation, with adverse consequences for the insurance industry and for the system of state regulation and taxation of insurance.

The insurance transactions involved in this case take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

The insured is not a resident of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

The 5% premium tax is a tax and not a regulation. It was enacted for the purpose of making insurance purchased from non-licensed insurers otherwise than through a Texas insurance agent subject to the same tax as that imposed on insurance purchased from non-licensed insurers through Texas insurance agents, and has no regulatory purpose or function.

Treated as a tax, it is invalid under *Connecticut General Life Insurance Co. v. Johnson,* 303 U. S. 77

(1938), where this Court ruled invalid a California tax on premiums paid in Connecticut for reinsurance of life insurance policies covering California residents, notwithstanding that the insurance companies involved were licensed in California. The Texas tax here is not imposed on Todd's Texas property, nor on Todd's activities in Texas, nor on Todd's privilege of doing business in Texas, but is imposed on Todd's activities in New York, namely, on the payment by Todd in New York of insurance premiums in the course of New York insurance transactions. The due process clause denies Texas the power to exact a tax from insurance transactions outside its borders for which it provides no services or benefits.

Treated as a regulation, the tax is clearly invalid, as the courts below held, under *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346 (1922), *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426 (1926), and *Compañia General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 87 (1927). The petitioners in effect concede the invalidity of the Texas tax under these cases, but argue that they have been overruled by implication by such cases as *Osborn* v. *Ozlin*, 310 U. S. 53 (1940) and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943), and should now be expressly overruled.

It is not disputed that these cases differ in approach. The *Allgeyer* case looked to the making of the insurance contract as the significant event in an insurance transaction and invalidated state regulation of insurance contracted for outside the state as an interference with liberty of contract. The *St. Louis Cotton Compress Co.*, *Fidelity & Deposit Co.* and *Compañia* cases fol-

lowed *Allgeyer* twenty-five years later, but invalidated the state statutes involved on the basis of the principle that a state may not regulate activities outside its borders without repeating the emphasis of *Allgeyer* on liberty of contract. *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen*, within the framework of the due process limitations on a state's jurisdiction, looked to the aspects of the insurance transaction taken as a whole having contacts with the state, and to the relationship of the regulation involved to the state's interest in those aspects of the insurance transaction which were within the state.

The difference in approach, however, does not produce a difference in result. The same result would be reached in the four earlier cases under the approach of the two later cases. In the earlier cases, there was no significant connection between the state and the insurance transactions other than the presence of the insured property within the state. In each of the later cases, there were significant insurance activities in the state in addition to the presence of the insured property in the state.

In the present case there are no insurance activities in the state at all. The insurance transactions regarded as a whole take place entirely outside the state, and the physical presence of the insured property in the state is the only connection between the insurance transactions and the state. Texas has only a minimal interest in the insurance of Todd's Texas property; the consequences of inadequate insurance of the property fall not on Texas residents but on Todd.

In addition the 5% premium tax bears no reasonable relation as a regulatory measure to such interest as Texas may have in the insurance of Todd's Texas prop-

erty, unlike the statutes involved in *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen*, which were affirmative regulatory measures directed to specific state interests in insurance activities within the state. Texas does not require Todd to carry any of the insurance involved here; only if Todd chooses to insure is the tax imposed. If Todd places its insurance with non-licensed insurers, a 5% tax is imposed whether or not Todd deals through a licensed Texas agent. The Texas tax cannot realistically be said to control or to "regulate" in any way the placing of insurance with non-licensed insurers.

Thus, the insurance activities sought to be taxed take place wholly outside Texas; Texas has at best a minimal interest in the insurance of the property, the presence of which in Texas is Texas' sole connection with the insurance transactions; and the tax itself is not reasonably directed to the regulation of whatever interest Texas may have in the insurance of the property. The tax is therefore invalid as a regulation under *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen* as well as under *Allgeyer* v. *Louisiana*, *St. Louis Cotton Compress Co.* v. *Arkansas*, *Fidelity & Deposit Co.* v. *Tafoya*, and *Compañia General de Tabacos de Filipinas* v. *Collector of Internal Revenue*.

ARGUMENT

Introductory Statement Concerning the Role of the Due Process Clause in State Regulation and Taxation of Insurance

The regulation of insurance in the United States has traditionally been and remains regulation by the

states, which over the years have evolved a network of individual state regulatory and taxing schemes across the country. The system has on the whole been a workable one, satisfactory to the insurance industry, to the states and to the federal government. The insurance industry has grown and expanded to fulfill the social functions it serves under that system, and the present structure and organization of the industry is based on it. The due process clause has been essential to the functioning of the system.

The system developed principally during the years in which the business of insurance was held under decisions of this Court not to be "commerce" and therefore not subject to federal control.* During this period, the only factor which confined the states within the bounds of their proper legislative concern over local interests was the enforcement under the due process clause of the fundamental limits on the legislative jurisdiction of the individual states. The due process clause in effect served as arbiter of the system of state regulation and taxation of insurance, protecting individual insurance transactions against overreaching by individual states and militating against conflicting regulation and multiple taxation.

When insurance was held to be commerce in 1944 in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, Congress promptly expressed its desire, by the enactment of the McCarran Act, 59 Stat. 33, 15 U. S. C. §§ 1011-1015 (1945), that the regulation and taxation of insurance continue to be left to the states

* *E.g.*, *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495 (1913); *Paul* v. *Virginia*, 75 U. S. (8 Wall.) 168 (1869).

without impediment from the commerce clause.* At the same time, however, Congress indicated its reliance on the due process clause as the means by which the states would continue to be prevented from asserting jurisdiction over matters beyond their legitimate legislative concern, referring to decisions of this Court invalidating attempts by a state to regulate or tax insurance transactions in which the state had only a minimal interest. Congress referred specifically to *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897), *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346 (1922) and *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U. S. 77 (1938).**

* "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U. S. C. § 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, . . . the Sherman Act, and . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U. S. C. § 1012.

The continued taxation and regulation by the states of interstate insurance transactions under the McCarran Act was upheld in *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408 (1946).

** The Report of the House Judiciary Committee stated:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in

To overrule these cases, as Texas asks here, would be vastly to expand the authority of every state with which an insurance transaction has any connection, substantially increasing the risks of conflicting regulation and multiple taxation and jeopardizing the functioning of the system of state regulation and taxation. If the Texas tax at issue here is upheld, no insurance policy could thereafter be issued covering a risk in any state without subjecting the entire insurance transaction to the taxing and regulatory jurisdiction of that state, regardless of the degree of the state's interest in the transaction apart from the presence of the insured property, or the extent to which the transaction might already be subject to the regulations and taxes of another state with a more substantial interest. An insurance policy insuring goods against loss in transit, for example, would be subject to regulation and taxation by each state through which the goods passed.

The consequences of such a result would fall particularly heavily on the small insurance company. As noted above, Church Fire and The Catholic Relief Insurance Company would not be able to support the heavy burden of ascertaining and complying with the requirements of the states in which they are not now licensed, and would be effectively precluded from continuing to write insurance on church properties in those states. The growth and development of other small insurance companies not limited as are Church Fire and The Catholic Relief Insurance Company in their potential for expansion would be seriously restricted by the

the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 77). . . ." H. R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945).

burden of such compliance. The large insurance companies which are licensed and active in all fifty states would thereby receive a further competitive advantage in addition to those they already possess by virtue of their size.

The operation of even the large insurance companies would be significantly hampered in being required to comply with the laws of all the states with which any given insurance transaction might have any connection. To permit a state to regulate or tax all aspects of an insurance transaction solely on the basis of the physical presence in the state of the insured property would go far beyond what has heretofore been permitted to an individual state in the federal system, and far beyond what has heretofore been thought necessary to enable an individual state to protect its legitimate local interests. To abandon the limits on a state's legislative jurisdiction heretofore enforced under the due process clause, and on which the system of state regulation and taxation of insurance has in large part depended, would have adverse consequences for the insurance industry and the system of state regulation and taxation of insurance.

A. The insurance transactions involved in this case take place entirely outside Texas; there is no local insurance activity over which Texas may exercise its jurisdiction to tax or regulate.

The insurance premiums over which Texas asserts its jurisdiction in this case are insurance premiums paid outside Texas as part of insurance transactions conducted between the insurer and the insured entirely outside Texas.

Todd Shipyards Corporation is a New York corporation with its principal office, principal place of busi-

ness and domicile in New York. It conducts its shipyard business in New York and a number of other states, including Texas, where it has been duly qualified to do business as a foreign corporation since 1934. (R. 44, 46, 158-60.)

The insurance on Todd's business and properties is managed by its insurance and claims manager in New York, who decides all matters relating to the purchase and renewal of Todd's insurance, including the type and amount of coverage and the selection of the insurers. (R. 45, 160, 164-65.)

The particular insurance involved here provides coverage primarily for loss from physical damage to Todd's property, or from liability by Todd for physical damage to the property of others in Todd's custody, at its shipyards in Louisiana, New Jersey, New York and Texas.* (R. 47, 161-62.) It is negotiated by Todd in New York with two English insurers, Lloyds of London and The Institute of London Underwriters, principally through three New York insurance brokers, Johnson & Higgins, Griswold & Company and Marsh & McLennan, Inc. (R. 44-45, 48, 162-64, 177.) The insurance premiums are paid by Todd's New York office to the brokers in New York; the insurance policies are physically signed and issued by the insurers in London and are accepted by Todd in New York; the policies state that as between the insured and the insurer New York may be considered as the place of issue, at the option of

* Some of the policies included in the Record relate solely to Texas property (*e.g.*, Item 2a of Ex. B, R. 64), while others relate to property in Louisiana, New Jersey, New York and Texas (*e.g.*, Item 1a of Ex. B, R. 52). The only other type of insurance involved is excess product liability insurance, an initial amount of coverage being carried with an insurer licensed in Texas and coverage in excess of such amount being carried with the English insurers (Item 5a of Ex. B, R. 92; Item 6b of Ex. B, R. 102; R. 139).

the insured. (R. 45, 48-49, 169.) Renewals of the insurance policies are negotiated and agreed upon in New York between Todd's New York office and the New York brokers. (R. 48-49. 169-70.)

In the event of a loss at Todd's Texas properties, Todd's officials in Texas inform Todd's insurance manager in New York, who notifies the New York broker. (R. 49, 165.) An independent appraiser is then appointed in New York to survey the damage, and the appraiser physically inspects the loss in Texas, with the assistance of Todd's representatives in Texas. (R. 49, 166-67.) The appraiser submits a report of its findings as to the dollar amount of the damage to Todd in New York. (R. 49, 166-67.) The appraiser's fees for its services are paid by Todd in New York. (R. 49.) The extent to which the loss is covered by the policies is thereafter adjusted in New York between Todd and the insurance companies through the New York brokers. (R. 45, 49-50, 166-68, 173-74.) All losses are paid by the insurers to Todd in New York. (R. 45, 170.)

Todd's Texas offices do not correspond or conduct any negotiations or transactions directly or indirectly with the insurers or the New York brokers. (R. 45, 164-65, 168-69.) Neither of the English insurers has an office or agent in Texas or is licensed to write insurance in Texas. (R. 47.) Neither insurer has ever solicited Todd's insurance business or policies within Texas. (R. 45.) The nature of the insurance is such that the insurers make no inspection of the properties before issuing their policies (R. 164), and the insurers do not conduct any investigation of claims in Texas. (R. 45.) None of the brokers through whom the insurance is negotiated is licensed as an insurance agent in Texas; all three of the principal brokers are licensed New York

insurance brokers and are licensed to place the insurance of the two English insurers. (R. 48, 140.)

Thus, not only does the payment of the insurance premiums that Texas seeks to tax take place in New York, but the entire series of acts which collectively make up the insurance transactions as a whole take place altogether outside of Texas: no act in the negotiation of the policies, the payment of premiums or the adjustment of losses occurs in Texas. The only connection between the insurance transactions and Texas is the fact that the risks being insured are physically located in Texas.*

As will be shown below, the presence of the insured property in Texas alone is not a sufficient basis under the due process clause to support the taxation or regulation by Texas of what are essentially New York insurance transactions.

B. The Texas premium tax is a tax and not a regulation.

The petitioners' brief treats the 5% premium tax imposed by Article 21.38 of the Texas Insurance Code only as a regulation, apparently conceding its invalidity as a tax. The tax, however, was clearly intended by

* The fact that Todd is qualified to do business in Texas has no bearing on the present case, since the tax is imposed on all premiums paid to unauthorized insurers, and would accordingly be imposed on Todd whether or not Todd is qualified to do business as a foreign corporation. The only other Texas activity which could remotely be argued as being involved in the insurance transactions is the physical inspection of loss damage in Texas by an independent appraiser in conjunction with Todd representatives. (R. 166-67.) The making of such inspection in Texas, however, is only an incidental by-product of the fact that Todd's property is physically located there. The inspection is an initial step in the process by which Todd in New York acquires information with which to furnish proof of the loss to the insurers in New York (the insurance policies themselves make no provision as to what constitutes satisfactory proof of loss, R. 52-132). The report based on the physical inspection is submitted to Todd in New York and is paid for by Todd in New York. The actual adjustment of the loss is made entirely in New York between Todd and the insurers through the New York brokers.

Texas as a tax, operates as a tax and has been treated by Texas as a tax.*

The Texas Legislature enacted the premium tax as a tax. The 5% premium tax at issue here was enacted in 1957 as a tax for the purpose of supplementing an existing 5% tax already imposed on premiums for so-called "surplus" insurance covering Texas risks purchased from non-licensed insurers through licensed Texas agents. In Section 7 of the 1957 amending statute (Chap. 395, 55th Reg. Sess., 1957), the Texas Legislature stated that the reason for the tax was

> "The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately for the conditions under which it shall be placed with unauthorized insurers *in a manner which will insure the collection of the tax levied upon the premiums charged or paid for such insurance. . . .*" (Emphasis added.)

This authoritative legislative statement in the amending act itself that the tax was enacted as a tax is confirmed by the prior history of Article 21.38.

History of Article 21.38 of the Texas Insurance Code. Article 21.38 was originally enacted in 1949 (Chap. 617, 51st Reg. Sess., 1949).** Prior to 1949, and since 1879, Texas insurance agents had been prohibited from placing insurance with an insurer not licensed in Texas, on penalty of a fine of up to $1,000 and personal liability to the insured under the policies.*** Hence,

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* Article 21.38 of the Texas Insurance Code is set out in full as Exhibit A of this brief.

** The substantive provisions of the 1949 statute became the present Article 21.38 without change in the 1951 recodification of the Texas Insurance Code.

*** General Laws, Chap. 36, Spec. Sess. (1879). These provisions are now contained in Article 570 of the Texas Penal Code and Article 21.02 of the Texas Insurance Code.

prior to 1949 an agent with a customer desiring coverage for a particularly large risk in Texas could negotiate only for that amount of coverage available from insurers licensed in Texas; the customer would then have to obtain the excess insurance by some other means. The 1949 enactment of what is now Article 21.38 authorized licensed Texas insurance agents to place with non-licensed insurers "excess" or "surplus" insurance, *i.e.*, insurance not available from insurers licensed in Texas, on payment of a $25 fee and filing of a $5,000 bond. A tax was imposed of 5% of the premiums paid for excess insurance so purchased through a licensed Texas agent.*

After 1949, a Texas insurance agent could thus place excess insurance covering Texas risks for his customers, subject to a tax of 5% of the premiums. Persons desiring insurance, however, were still free, as they had been before, to obtain insurance covering Texas risks from non-licensed insurers otherwise than through a Texas agent, whether or not the insurance was procurable from licensed companies. If anyone chose to obtain the insurance otherwise than through the agent the 5% tax was avoided.**

The 1957 amendment added the 5% tax at issue here, which is imposed on premiums for insurance covering Texas risks purchased from non-licensed companies otherwise than through a licensed Texas agent.

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* The remainder of Article 21.38, not at issue in this case, provides for service of process upon non-licensed insurers in any suit arising out of an insurance policy effected by the non-licensed insurer by acts inside Texas, and for the furnishing of security by the insurer as a defendant in such a suit. Significantly, none of the acts giving rise to the insurance transactions involved here would subject the insurers to service of process in Texas in a suit on the insurance policies even under this statute.

** The tax is technically imposed on the agent; the effect of the tax is to increase the cost of the insurance.

It is thus clear that the sole purpose of the addition in 1957 of the 5% premium tax at issue in this case was to supplement the existing 5% tax on excess insurance placed with non-licensed insurers through licensed Texas agents, as the Texas Legislature indicated at the time of its enactment in the passage quoted above.

The existing tax which the 1957 amendment was designed to supplement itself had no regulatory purpose or function. Placing of excess insurance with non-licensed insurers through licensed Texas agents, on which the existing tax was imposed, was already regulated by the other provisions of Article 21.38 requiring that the agent file a $5,000 bond and that he be already regularly commissioned to represent a licensed insurer. The 5% tax on excess insurance placed through Texas agents could not have had the purpose of encouraging insurance with licensed insurers, since the only insurance on which the tax was imposed was insurance not available from licensed insurers. The 5% tax at issue here on insurance placed otherwise than through a Texas agent could not have had any more of a regulatory purpose than the tax it was intended to supplement. Nor can the 1957 amendment have been intended to discourage dealing otherwise than through a Texas agent, since the tax on the insurance purchased from non-licensed insurers is 5% whether or not purchased through a Texas agent.

That the 1957 amendment was intended only as a tax is further borne out by the fact that it added Section 2(f) to Article 21.38, providing that the 5% premium tax is imposed only on that part of the premiums paid for insurance covering risks in Texas, whether or not purchased through a Texas agent. Apportionment is the language of taxation, not regulation. Had

the 5% tax been intended as a regulation, there would be no provision for apportionment.

The petitioners' brief (pp. 7-8), in asserting that the purpose of Article 21.38 is to "regulate" the placing of insurance with non-licensed insurers, points to the statement in Section 1 of Article 21.38 that its purpose is

> "... to regulate the placing of policies or contracts, effecting direct insurance, with certain non-authorized insurers, and to subject certain unauthorized insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The Legislature declares that it is the subject of concern that the placing of such direct lines of insurance with unauthorized insurers is not properly regulated ..."

Section 1, however, was the statement of the purpose of Article 21.38 at the time of its original enactment in 1949; the quoted language was already present in the statute at the time of the addition of the 5% tax at issue here in 1957. Further, the "regulation" referred to in Section 1 clearly refers to the regulatory provisions for the licensing of Texas agents to place excess insurance with non-licensed insurers (the filing of a $5,000 bond and the requirement that he be regularly commissioned to represent a licensed insurer), and not to the 5% tax imposed on premiums paid for such insurance.

Administrative determination of the tax as an occupation tax. Consistent with the Legislature's intent of imposing a tax rather than a regulation, the Texas authorities have determined administratively that the 5% premium tax is an occupation tax. Article 7, Section 3 of the Texas Constitution requires one-fourth of all "occupation taxes" to be set aside for the Public

Free School Fund. Both the 5% premium tax originally imposed on excess insurance placed through licensed Texas agents and the 5% tax at issue here have been determined by the State Board of Insurance and the Comptroller of the State of Texas to be an occupation tax, and one-fourth of the proceeds of such taxes has accordingly been set aside for the Public Free School Fund. (R. 137-38.)

C. The Texas premium tax is invalid under *Connecticut General Life Insurance Co. v. Johnson* as a tax on insurance transactions outside Texas for which Texas provides no services or benefits.

In *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77 (1938), this Court held invalid under the due process clause a California tax of 2.6% on the premiums paid in Connecticut by one insurance company to another insurance company for reinsurance of life insurance policies written in California on California residents, where both insurance companies were authorized to do business in California. The Court emphasized that all the steps in the reinsurance transaction took place outside California, that the transaction in no way depended upon any privilege or authority granted by California, and that the transaction received no protection from the laws of California.

Chief Justice (then Justice) Stone for the Court said (pp. 80-82):

> "... the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of

transactions within the state . . . a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. [citations omitted] . . .

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. [citations omitted] Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. *The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection . . .*

"*All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.*" (Emphasis added.)

The facts of the present case are almost identical. Texas seeks to impose a tax on premiums paid outside Texas as part of insurance transactions which take place outside Texas for insurance on Texas risks. The conduct of the insurance transactions in New York

does not depend on any authority or privilege granted by Texas, and receives no services or benefits from the laws of Texas. The only connection between Texas and the out-of-state insurance transactions is the physical presence in Texas of the insured property.

The tax is not imposed on Todd's privilege of doing business in Texas, for Todd would be liable for the tax if it were not qualified as a foreign corporation to do business in Texas. Article 21.38 imposes the 5% tax on any person purchasing insurance from an insurer not licensed in Texas, without regard to the activities of the insured in Texas and without regard to whether the insured is a Texas resident, a foreign corporation licensed to do business in Texas, or a person altogether outside Texas. The tax is not imposed on Todd's property in Texas—the 5% tax is not payable if insurance on the same property is purchased from licensed insurers, and such property is in any event already subject to direct Texas property taxes.

While the insurers may benefit indirectly by the protection afforded by Texas to the property itself, the premium tax can in no sense be considered an exaction for the protection of the insured property: Texas' protection of the property (for which direct taxes on the property are exacted) is provided whether or not the property is insured; Texas is not put to any additional burden in protecting the property because it is covered by insurance; the premium tax is not exacted at all if the insurance is purchased from licensed insurers. Texas seeks to tax the insurance transactions themselves—the negotiation and issuance of the insurance, the payments of the insurance premiums which are the direct object of the tax, and the adjustment of losses—

all of which take place in New York and derive no benefit from services or protection provided by Texas.*

Connecticut General Life Insurance Co. v. *Johnson* is squarely in point and is controlling on the question of the invalidity of the 5% premium tax as a tax. However, without attempting to canvass the numerous decisions of this Court dealing with state taxes, it may be helpful to analyze the present case in the context of certain of those decisions which have drawn a line between (a) state taxes on activities within the state measured by activities outside the state, and (b) state taxes on activities outside the state measured by activities outside the state, the former type of tax being valid and the latter invalid.

In *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143 (1915), a Pennsylvania tax of 2% on premiums paid on insurance business done within the state was held valid under the due process clause as applied to premiums physically paid outside Pennsylvania to the insurer by Pennsylvania residents. The insurance company was qualified to do business in the state, the tax was on the privilege of doing business in the state, and the premiums paid for insurance on the lives of the residents of the state were held to be the measure for the tax imposed on business done in the state. In *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435

* In its only lapse from its otherwise consistent silence on the subject of the tax as a tax, the petitioners' brief (p. 15) suggests that the 5% premium tax was enacted for the purpose of equalizing the tax burden borne by licensed Texas insurers, arguing that the burden of Texas insurance regulation should be supported by taxes on non-licensed companies as well as by taxes on licensed companies. In addition to the fact that there is no evidence that the 5% premium tax was enacted for such a purpose, the insurance regulation for which petitioners would ask the non-licensed companies to pay taxes by definition does not apply to non-licensed insurers.

(1940), a Wisconsin tax on dividends paid by a corporation out of income attributable to business done within the state was held constitutional as applied to the payment of dividends outside the state by a foreign corporation, on the ground that the tax was in effect a tax on income derived from Wisconsin business, liability for which was deferred until distribution of the income by the corporation as a dividend. In these two cases the transactions upon which the tax was imposed occurred within the state, the activities outside the state being merely the measure of the tax imposed. By contrast, the insurance transactions which Texas seeks to tax in the present case are themselves entirely outside the state, as well as the payment of the premiums which is made the measure of the tax.

Similarly, the Court has distinguished between a state sales tax imposed on a sale outside the state followed by shipment of the goods into the state, holding such a tax invalid in *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944), and a state use tax imposed on the use of goods within the state following a sale of the goods outside the state, holding the latter type of tax constitutional in *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335 (1944).*

In the language of these cases, the presence within a state of insured property does not constitute a sufficient nexus between the state and the insurance of the property wholly outside the state to support a tax on the out-of-state insurance transactions.

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* The issue in these two cases arose under the commerce clause, but the Court's decision is couched in terms of state legislative jurisdiction. Other state use tax cases, such as *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340 (1954), and *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960), are directed not so much to the validity of the use tax imposed as to whether the seller of the goods may fairly be required to collect the tax, and have no bearing on the present case.

D. Even if treated as a regulation, the Texas premium tax is invalid as an attempt to regulate insurance transactions outside Texas; the tax is not reasonably directed to the protection of any interest of Texas in the insurance transactions here involved.

This Court has repeatedly held that the due process clause prohibits a state from regulating insurance transactions outside its borders.

In *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897), a Louisiana statute was held invalid which made it a misdemeanor to effect insurance on Louisiana risks with an insurance company not licensed to do business in Louisiana, where the insured had contracted in New York for an open insurance policy and thereafter mailed a letter from Louisiana to New York in accordance with the terms of the policy advising of the shipment from Louisiana of goods to be covered under the policy. In *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346 (1922), an Arkansas 5% premium tax imposed under circumstances identical to those of the present case was held invalid on the ground that the imposition of a 5% tax was in the same category as the absolute prohibition held invalid in *Allgeyer* v. *Louisiana.* In *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426 (1926), a New Mexico statute was held invalid which prohibited licensed insurers from paying any fee to a non-resident for obtaining or writing insurance covering New Mexico risks, where the licensed insurer made payments to agents in other states in connection with its business in New Mexico. In *Compañía General de Tabacos de Filipinas* v. *Collector of Internal Revenue,* 275 U. S. 87 (1927), a Philippine statute was held invalid which imposed a tax of 1% on premiums paid for insurance from non-licensed insurers covering risks

in the Philippines, on the authority of *St. Louis Cotton Compress Co.* v. *Arkansas.*

Petitioners' brief suggests (p. 7) that these cases have in effect been overruled by more recent decisions of this Court. The petitioners point specifically to *Osborn* v. *Ozlin,* 310 U. S. 53 (1940), where a Virginia statute was upheld requiring policies issued by insurers licensed in Virginia covering Virginia risks to be countersigned by resident agents, and to *Hoopeston Canning Company* v. *Cullen,* 318 U. S. 313 (1943), in which it was held that New York could constitutionally require out-of-state insurers active in the state to obtain a license to do business in New York, and that the conditions for obtaining such a license were reasonable.*

It is not disputed that these cases differ in their approach. The Court in *Allgeyer* v. *Louisiana* looked principally to the making of the insurance contract as the significant event in the insurance transaction and invalidated Louisiana's regulation of insurance contracted for outside the state as an interference with

* The petitioners also point to *Travelers Health Ass'n* v. *Virginia*. 339 U. S. 643 (1950), where the systematic mailing of insurance policies and the solicitation of insurance business by mail from outside Virginia by a non-licensed insurer was held a sufficient basis to subject the non-licensed insurer to service of process in Virginia, and to *Watson* v. *Employers Liability Assurance Corp.,* 348 U. S. 66 (1954), where it was held that Louisiana could enforce its statute authorizing a direct action by an injured person directly against the insurance company providing coverage to the insured against liability to third persons for such injury, where the insurer and insured were licensed to do business in Louisiana and the petitioner was a Louisiana resident, notwithstanding a provision in the insurance contract entered into in Massachusetts prohibiting such direct suit. Neither of the two lines of cases represented by these two decisions is relevant to the present case, the first dealing with the circumstances under which it is fair to subject an out-of-state company to suit in the courts of the state, and the second dealing with the extent to which a state's courts may enforce the state's public policy in a suit between two private litigants involving local activities in which the state has an interest.

liberty of contract. Twenty-five years later the Court speaking through Justice Holmes in the *St. Louis Cotton Compress Co.* and *Fidelity & Deposit Co.* cases and through Chief Justice Taft in the *Compañia* case followed *Allgeyer* v. *Louisiana* on the basis of general statements that a state may not regulate activities beyond its borders, without repeating the emphasis of the *Allgeyer* opinion on the place of making of the contract or on liberty of contract under the Fourteenth Amendment. *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen,* within the framework of the principle that a state may not regulate activities beyond its borders, looked to the aspects of the insurance transaction taken as a whole having contacts with the state, and to the relationship of the regulation involved to the state's interest in those aspects of the insurance transaction within the state.

The difference in approach, however, does not produce a difference in result. The same result would be reached in each of the earlier four cases cited above under the approach of the two later cases. In the earlier cases, there was no connection between the state and the insurance transactions other than the presence of the insured property within the state, with the possible exception of *Allgeyer* v. *Louisiana,* where the only additional act in Louisiana was the mailing of a notice to New York of the shipment of goods from Louisiana covered under a policy previously entered into in New York.

In each of the later cases, there were significant insurance activities in the state in addition to the presence of the insured property in the state. In *Osborn* v. *Ozlin,* the insurers were licensed insurance companies doing business in the state and the regulation of the

statute involved was imposed only on licensed companies. In *Hoopeston Canning Co.* v. *Cullen*, the insurance involved was a form of cooperative insurance under which the insureds participated in reciprocal insurance through an attorney-in-fact; insurance applications were mailed in New York by a large number of New York insureds to the attorney-in-fact in Illinois; insurance contracts were mailed by the attorney-in-fact in Illinois to the New York insureds; representatives of the attorney-in-fact visited New York to investigate prospective risks, to advise insureds as to methods of reducing fire hazards and to investigate claims.

In the present case, as in the earlier cases, there are no insurance activities in the state at all. The insurance transactions which are the object of the claimed "regulation" here take place entirely outside the state. None of the cases cited by the petitioners casts any doubt on the fundamental proposition that a state may not regulate activities wholly outside the state. This Court recently acknowledged this fundamental proposition by implication in *FTC* v. *Travelers Health Ass'n*, 362 U. S. 293 (1960), in referring to constitutional doubts as to Nebraska's power to regulate extraterritorial activities even of its own domiciliary corporations, where Nebraska's prohibition against deceptive trade practices outside the state by a Nebraska domiciliary was held not to be "regulation" for purposes of ousting the Federal Trade Commission of jurisdiction over such practices under the McCarran Act.

Nor does the 5% premium tax bear any reasonable relation as a regulatory measure to the interest of Texas in the insurance of Todd's Texas property, unlike the statutes involved in *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen*, which were affirmative regula-

tory measures directed to specific interests of the state in insurance activities within the state.

The interest of Texas in the insurance of Todd's Texas property is presumably to see that the property is properly insured with solvent and responsible insurers, on the ground that if there are losses under the policy which are not paid by the insurers, the consequences may have repercussions on Texas interests. However, the primary beneficiary of the insurance involved in this case is Todd itself. The three categories of insurance involved here are insurance against (1) loss from physical damage to Todd's own property, (2) liability for loss from physical damage to property of others in Todd's custody, and (3) product liability in excess of the amount covered by Todd's policy with an insurer licensed in Texas. (R. 47, 51, 139). If the insurers are unsound and fail to cover losses under the policies, the loss falls initially on the Todd corporate enterprise, a New York corporation with most of its assets outside Texas, and not on Texas residents. Any possible interest of Texas is involved only in the second two categories of insurance and only in the more remote event that the insurance is not paid and Todd's assets are then insufficient to cover its liabilities.

The 5% premium tax is not reasonably directed to the protection of this minimal interest of Texas in the insurance of Todd's Texas property. Texas does not require Todd to carry any of the insurance on which the tax is sought to be imposed here. Only if Todd chooses to insure is the tax imposed. Indeed, as to the "excess" insurance, or insurance not available from insurers licensed in Texas, the effect of the 5% tax on premiums paid to unauthorized insurers, if any, is to discourage taking out the insurance.

Further, the tax is indiscriminately imposed on all insurance placed with unauthorized insurers, without distinction between life insurance, fire insurance or casualty insurance, without regard to whether the insured or the beneficiary of the insurance is a Texas resident, a foreign corporation, or a natural or corporate person, and without regard to whether the unauthorized insurer is financially responsible or subject to regulation by other jurisdictions. A "regulation" so sweepingly applied to so broad a range of situations would normally be predicated on the assumption that the practice so regulated is fundamentally and inherently evil, to be condemned in all its forms. Yet Texas has not attempted to prohibit insurance with unauthorized insurers, but, under the petitioners' argument (brief, p. 10), "regulates" such insurance by imposing a mild deterrent equally on all forms of insurance with unauthorized insurers placed otherwise than through a licensed agent. The identical 5% deterrent is imposed if the insurance is placed through a licensed agent, who is subject to Texas' control and is regulated by Texas. The tax may not be a deterrent at all, if there is a saving in cost by insuring with unauthorized insurers rather than with authorized insurers equal to or greater than the difference between the 5% tax on insurance with unauthorized insurers and the tax (a range of 1.1% to 3.85%, R. 46) on insurance with authorized insurers.

The plain fact is that the 5% premium tax cannot really be said to control or to "regulate" in any way the placing of insurance with unauthorized insurers otherwise than through licensed Texas agents. As noted above, it is basically a tax and not a regulation.

The insurance transactions sought to be taxed here regarded as a whole take place wholly outside Texas;

the only connection between Texas and the insurance transactions is the presence of the insured property in Texas; Texas at best has a minimal interest in the insurance of Todd's Texas property; the 5% premium tax bears no reasonable relation to the protection of that minimal interest. These factors individually and cumulatively render the 5% premium tax invalid as a regulation under *Osborn* v. *Ozlin* and *Hoopeston Canning Co.* v. *Cullen* as well as under *Allgeyer* v. *Louisiana, St. Louis Cotton Compress Co.* v. *Arkansas, Fidelity & Deposit Co.* v. *Tafoya* and *Compañía General de Tabacos de Filipinas* v. *Collector of Internal Revenue.*

Conclusion

The insurance transactions over which Texas seeks to assert jurisdiction in this case take place entirely outside Texas, and the sole connection between Texas and the out-of-state insurance transactions is the physical presence of the insured property in the state. Under the decisions of this Court, the physical presence of insured property within a state does not alone give the state power to tax or to regulate the insurance of that property outside the state.

The judgment of the Texas Court of Civil Appeals should be affirmed.

Respectfully submitted,

CLOYD LAPORTE,
JOHN MASON HARDING,
Attorneys for The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America as amici curiae.

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD,
Of Counsel.

February 16, 1962

EXHIBIT A

Article 21.38 of the Texas Insurance Code

Art. 21.38. Direct Insurance With Unauthorized Insurers

Sec. 1. Purpose of Article.—The purpose of this article is to regulate the placing of policies or contracts, effecting direct insurance, with certain non-authorized insurers, and to subject certain unauthorized insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The Legislature declares that it is the subject of concern that the placing of such direct lines of insurance with unauthorized insurers is not properly regulated, and that many residents of this State hold policies of insurance issued by insurers not authorized to do business in this State, thus presenting to such residents the often insurmountable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such State interest, the Legislature herein provides a regulation as to the placing of such direct lines of insurance in such unauthorized companies, and the method of direct service and substituted service of process upon such insurers, and declares that in so doing it exercises its powers to protect its residents, and to define for the purpose of the Statute what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, Seventy-ninth Congress of the United States, Chapter 20, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

Sec. 2. Tax on Insurance Premiums. Policies or Insurance Contracts Placed with Unauthorized Insurers; Licensing of Agents; Affidavit of Insureds and Report of Agents

(a) The Board of Insurance Commissioners, upon payment by the applicant of an annual license fee of Twenty-five Dollars ($25), which fee shall be placed in the separate fund that is provided pursuant to Section 21 of Article 21.14 of the Insurance Code, may issue to an agent who is regularly commissioned to represent one (1) or more fire, fire and marine, inland, casualty or surety insurance companies, licensed to do business in this State, a Certificate of Authority to place lines of direct insurance affected hereby to be evidenced by policies of insurance or certificates of insurance in insurers not licensed to do business in this State (hereinafter sometimes referred to as unauthorized insurers). Each such license shall expire on the 31st day of the succeeding December. No diminution of the license fee herein provided shall occur as to any license effective after January 1st of any year. The Board may require written application for such license.

(b) Before receiving the license provided for in the preceding Section of this law, the party applying for same shall file with the Board a bond in the sum of Five Thousand Dollars ($5,000) payable to the Governor, for the faithful observance of the provisions of this Article. Said bond shall be approved by the Board and be for the benefit of the State of Texas.

(c) When any policy of insurance or certificate of insurance is procured under authority of such license, there shall be executed by the insured an affidavit setting forth facts showing that such insured was unable after diligent effort to procure from any licensed company or companies the full amount of insurance required to protect the property, liability or risk de-

sired to be insured, and further showing that the amount of insurance procured from nonlicensed insurer or insurers is only the excess over the amount so procurable from licensed companies. Each such affidavit shall be filed with the Board with the tax report required in accordance with the provisions of Subdivision (d) below.

(d) The agent so licensed shall report, under oath, to the Board within thirty (30) days from the 1st day of January and July of each year the amount of gross premiums paid for such insurance placed through him in nonlicensed insurers, and shall pay to the Board a tax of five per cent (5%) thereon. The term 'gross premiums' shall mean the total gross amount of premiums received on each and every such insurance, less return premiums. The agent so licensed shall keep a separate record of all transactions as herein provided, open at all times to the inspection of the Board.

(e) If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer.

(f) If any such policy purchased from an insurer not licensed in this State, either by purchase from such insurer or through an agent licensed hereunder, shall cover risks partially within and partially without this State, the tax levied in Subdivisions (d) and (e) above is to be measured only by that portion of the premium paid for insurance covering risks within this State.

(g) Any person, firm, association or corporation, or any receiver of such, failing to pay any tax for a period of thirty (30) days from the date when said tax is required by the foregoing Subdivision (d) or Subdivision (e) (whichever is applicable), shall forfeit and pay to the State of Texas a penalty of twenty-five per cent (25%) upon the amount of such tax and in which event the Board of Insurance Commissioners shall report the default to the Attorney General of Texas who shall prosecute a suit for and be entitled to recovery of the amount of such tax and the amount of such additional penalty, which amount both tax and penalty shall draw interest at the rate of six per cent (6%) per annum from the date such penalty accrues until fully paid.

(h) The provisions of this Act shall not apply to contracts of re-insurance made between insurance companies.

Sec. 3. Acts Not Permitted; Permissible Acts of Agents.—Nothing contained in this article shall authorize any person, firm, association, or corporation to guarantee or otherwise validate or secure the performance or legality of any agreement, instrument or policy of insurance of any insurer not licensed to do business in Texas, nor to permit or authorize any nonlicensed insurer to do any insurance business by or through any person or agent acting within this State; but agents licensed hereunder acting pursuant to this article may issue and deliver to their clients, the insured, binders, policies and other confirmation of direct insurance so lawfully placed, and shall not be personally liable to the holder of any policy of insurance so issued or delivered for any loss covered by same.

Sec. 4. Suits Against Unlicensed Insurers.—A nonlicensed insurer may be sued upon any cause of

action arising in this State under any contract issued by it as hereinabove authorized, in a court of competent jurisdiction in any county in which the plaintiff may reside, or in which the cause of action arose. Any such policy or contract shall contain a provision authorizing service of citation or other legal process upon a person or firm whose name and address shall be set out therein, which said person, or at least one (1) of the members of said firm, shall be residents of Texas. Or in lieu thereof any such policy or contract shall contain a provision authorizing service of citation or other legal process upon the Chairman of the Board of Insurance Commissioners, designating the person to whom said Chairman shall mail citation or other legal process. In the event service of legal process against a nonlicensed insurer is made by service upon the Chairman of the Board of Insurance Commissioners, he shall forthwith mail citation or other document or process required to the person designated by the nonlicensed insurer in the policy for the purpose by registered mail with return receipt requested. In the event of service of citation or other legal process upon the Chairman of the Board of Insurance Commissioners of Texas, the nonlicensed company shall have forty (40) days from date of service upon said Chairman within which to plead, answer or otherwise defend the action. Upon service of process upon the Chairman of the Board of Insurance Commissioners in accordance with this law, or upon the person or firm designated in the policy or contract in accordance with this law, the court shall be deemed to have jurisdiction in personam of the nonlicensed insurer. A nonlicensed insurer issuing such insurance policy or contract shall be deemed thereby to have authorized service of process against it in the manner and effect as provided in this article.

Sec. 5. Application of Preceding and Succeeding Sections.—As to any policy or contract issued pursuant

to and in compliance with all the applicable requirements of the preceding Sections of this Article, and as to any claim for loss or damage arising under any such policy or contract, the foregoing Sections of this Article shall apply, and the succeeding Sections of this Article shall not apply except to the extent provided in Section 7 of this Article. As to any such policy or contract issued by an unauthorized insurer in a manner not in compliance with all the applicable requirements of the preceding Sections of this Article, the following Sections of this Article shall apply.

Sec. 6. Service of Process Upon Unauthorized Insurer

(a) As to any policy or contract issued by an unauthorized insurer in a manner not in compliance with all the applicable requirements of the foregoing provisions of this Article, any of the following Acts in this State, effected by mail or otherwise, by an unauthorized foreign or alien insurer, (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the Chairman of the Board of Insurance Commissioners and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

(b) Such service of process shall be made by delivering to and leaving with the Chairman of the Board of Insurance Commissioners, or some person in apparent charge of his office, two (2) copies thereof and the payment to him of such fees as may be prescribed by law. The Chairman of the Board of Insurance Commissioners shall forthwith mail by registered mail one (1) of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten (10) days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(c) Service of process in any such action, suit or proceeding shall in addition to the manner provided in Subsection (b) of this Section be valid if served upon any person within this State who, in this State on behalf of such insurer, is

(1) soliciting insurance, or

(2) making, issuing or delivering any contract of insurance, or

(3) collecting or receiving any premium, membership fee, assessment or other consideration for insurance; and a copy of such process is sent within ten (10)

days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(d) No plaintiff or complainant shall be entitled to a judgment by default under this Section until the expiration of thirty (30) days from date of the filing of the affidavit of compliance.

(e) Nothing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

Sec. 7. Defense of Action by Unauthorized Insurer.

(a) As to any policy or contract issued by an unauthorized insurer in a manner not provided by Sections 1, 2, 3(a), 3(b), 3(c) and 3(d) of this Article, and as to any claim arising thereon or thereunder, before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (1) deposit with the clerk of the court in which such action, suit or proceeding is pending, cash or securities, or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient

to secure the payment of any final judgment which may be rendered in such action; or (2) procure a certificate of authority to transact the business of insurance in this State.

(b) The court in any action, suit or proceeding, in which service is made in the manner provided in Subsections (b) or (c) of Section 6, may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection (a) of this Section and to defend such action.

(c) Nothing in Subsection (a) of this Section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Subsections (b) or (c) of Section 6 hereof on the ground either (1) that such unauthorized insurer has not done any of the acts enumerated in Subsection (a) of Section 6, or (2) that the person on whom service was made pursuant to Subsection (c) of Section 6 was not doing any of the acts therein enumerated.

CERTIFICATE OF SERVICE

I, Cloyd Laporte, one of the attorneys for The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America as *amici curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of February, 1962, I served copies of the foregoing Brief for the said *amici curiae,* pursuant to Rule 33 of the Revised Rules of the Supreme Court, by causing copies thereof to be deposited in a United States post office or mail box, with air mail postage prepaid, addressed to counsel of record for petitioners and respondent at their respective post office addresses, Capitol Station, Austin 11, Texas, and 510 Gulf Building, Houston 2, Texas.

Cloyd Laporte,
Attorney for The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America as amici curiae.